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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Mi Familia Vota, et al.,
Plaintiffs,
v.
Adrian Fontes, in his official capacity as
Arizona Secretary of State, et al.,
Defendants.

AND CONSOLIDATED CASES.

Case No. 2:22-cv-00509-SRB (Lead)
**MOTION SEEKING LEAVE TO
FILE EXHIBITS IN SUPPORT OF
MFV PLAINTIFFS' SUMMARY
JUDGMENT REPLY
(EXPEDITED BRIEFING
REQUESTED)**

No. CV-22-00519-PHX-SRB
No. CV-22-01003-PHX-SRB
No. CV-22-01124-PHX-SRB
No. CV-22-01369-PHX-SRB
No. CV-22-01381-PHX-SRB
No. CV-22-01602-PHX-SRB
No. CV-22-01901-PHX-SRB

INTRODUCTION

Plaintiffs Mi Familia Vota and Voto Latino (together, “MFV”), file this motion to advise the Court of MFV’s intention to file three exhibits consisting of recently disclosed written discovery responses from County Recorder Defendants with MFV’s forthcoming Reply to the State’s Consolidated Summary Judgment Response and Reply Brief, ECF No. 436 (“Response”), and seek leave to do so, should the Court find that leave is necessary. Those exhibits are submitted with this motion as Attachment A.

Counsel for MFV conferred with counsel for the State to obtain the State’s position on this motion and was advised that “Counsel for the State does not object to MFV attaching the exhibits to its forthcoming summary judgment reply, on the condition that the State be permitted a brief response to any fact assertions introduced by the exhibits. Accord LRCiv 56.1(b) (authorizing controverting statement of facts).” For the reasons discussed below, MFV believes that further response from the State is unwarranted. The exhibits were available to the State before it filed its Response, and MFV seeks to rely on them to respond to arguments made by the State in its Response. As such, it is not even clear that leave from the Court is required for MFV to rely upon these exhibits in their reply. Nevertheless, in the interest of disclosure and expediency, MFV has been candid with the State in its intention to file and refer to these exhibits and is filing this motion out of an abundance of caution, should the Court determine leave from the Court is required.

In light of the expedited briefing and hearing schedule, MFV requests that the Court order the State to file any response objecting to this motion by no later than July 17.

ARGUMENT

Under the Local Rules, MFV is permitted to file these exhibits with its reply brief without obtaining leave because they support arguments rebutting the State’s Response. Specifically, the new exhibits—which consist of discovery responses produced by County Recorder Defendants after MFV filed its partial motion for summary judgment, but before the State filed its Response brief—directly rebut assertions made in the State’s Response,

1 but do not contain “facts that the Court needs to decide the motion,” LRCiv 56.1(a), and
2 are not meant to serve as a reply statement of fact. The Court can and should grant MFV’s
3 motion for partial summary judgment based on the facts as they were known and submitted
4 to the Court at the time MFV filed that motion. These new exhibits simply further confirm
5 what the record already shows, and further rebut specific arguments made by the State in
6 its Response.

7 While the Local Rules prevent parties from filing supplemental statements of fact,
8 LRCiv. 56.1(b), this Court has found parties *can* attach exhibits to summary judgment reply
9 briefs that respond to arguments raised by the opposing party in their briefing, even where
10 the moving party did not first seek leave. *Bilyeu v. Morgan Stanley Long-Term Disability*
11 *Plan*, No. CV-08-02071-PHX-SRB, 2014 WL 12837695, at *1 n.1 (D. Ariz. Dec. 10, 2014)
12 (explaining Court considered “exhibits included with Defendants’ [summary judgment]
13 reply and the arguments relying on those exhibits” because they were “in response to
14 Plaintiff’s” summary judgment arguments); *see also E.E.O.C. v. Creative Networks, LLC*
15 *& Res-Care, Inc.*, No. CV-05-3032-PHX-SMM, 2008 WL 5225807, at *2 (D. Ariz. Dec.
16 15, 2008) (holding exhibits of deposition transcripts attached to defendant’s summary
17 judgment reply motion “were proper” though defendant did not seek leave to file them
18 because “they rebut[ted] arguments first raised by Plaintiff in its opposition to Defendant’s
19 Motion for Summary Judgment”).

20 Here, following MFV’s June 5, 2023 Cross-Motion for Partial Summary Judgment
21 and Opposition to Defendants’ Motions for Summary Judgment, ECF No. 399, but before
22 the State’s July 5, 2023 Response, several County Recorder Defendants served responses
23 to the consolidated Plaintiffs’ first set of interrogatories. *E.g.*, ECF Nos. 410–417, 419–433
24 (notices of service). These responses show—consistent with the evidence MFV submitted
25 with its cross-motion for partial summary judgment—that the County Recorders do not,
26 and have no reason to, use birthplace information to confirm an applicant’s registration
27 eligibility. This additional evidence further undercuts the State’s repeated assertion in its
28

1 Response that the Court can simply ignore how, and even whether, “election officials use
2 birthplace information.” State’s Resp. at 33 (suggesting this is “not the question” under the
3 Materiality Provision); *id.* at 34 (suggesting the Court look past the views of “the Secretary
4 of State and certain county representatives” who actually administer elections). Because
5 MFV intends to introduce these exhibits in Response to the State’s curious suggestion that
6 how Arizona’s election officials actually use information provided by prospective voters
7 when they register to vote is irrelevant to how those same officials “determ[in]e whether”
8 the information in question is material to the question of whether an “individual is qualified
9 under State law to vote,” 52 U.S.C. 10101(a)(2)(B), the Local Rules do not require leave.
10 *See, e.g., Bilyeu*, 2014 WL 12837695 at *1 n.1; *E.E.O.C.*, 2008 WL 5225807 at *2. MFV
11 nevertheless files this motion out of an abundance of caution and in the interest of
12 transparency, to give the State notice and an opportunity to argue that the exhibits are not
13 proper, without delaying the expedited summary judgment briefing and hearing schedule.

14 To the extent the Court believes leave is necessary for MFV to cite to these materials
15 in its reply, leave should be granted, because the exhibits “are in response to [the State’s]
16 argument about the” materiality of the birthplace provision “at issue in” its Reply. *Bilyeu*,
17 2014 WL 12837695 at *1 n.1; *see also Dowling v. Arpaio*, No. CV 09-01401-PHX-JAT,
18 2012 WL 300547, at *1 (D. Ariz. Feb. 1, 2012) (holding there are occasions where
19 “elevat[ing] form over substance and strictly enforce[ing] Local Rule 56 . . . [does] not
20 further the goals of the litigation”). And, in any event, the exhibits “do not constitute new
21 evidence,” *E.E.O.C.*, 2008 WL 5225807 at *2, both because they were available to the
22 State when the County Recorders served these responses, which was *prior to* the State’s
23 filing of its Response, and because they are not “facts that the Court needs to decide the
24 motion,” because the Court has ample basis to grant Plaintiffs’ motion based on the
25 evidence presented to it with that motion. LRCiv 56.1(a).

CONCLUSION

In sum, MFV files this motion out of an abundance of caution to provide notice of its intent to file three exhibits containing written discovery responses from County Records Defendants with its Reply in support of its cross-motion for partial summary judgment. MFV respectfully requests that the State be ordered to file its response to this motion, if any, by no later than July 17. For the reasons discussed, MFV does not believe that leave of the Court is necessary for MFV to rely on these additional exhibits in its reply brief, but should the Court find to the contrary, MFV respectfully requests that leave be granted.

Dated: July 12, 2023

Respectfully submitted,

/s/ Jillian L. Andrews

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CERTIFICATE OF SERVICE

On this day, July 12, 2023, I caused the foregoing to be filed and served electronically via the Court's CM/ECF system upon all counsel of record.

/s/ Jillian L. Andrews

Jillian L. Andrews